No. 94-1837 (13)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
Petitioner,
v.
TOM GALLAGHER, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN SUPPORT OF PETITIONER AND SEEKING REVERSAL FILED BY *AMICI CURIAE* CONSUMER BANKERS ASSOCIATION, AMERICA'S COMMUNITY BANKERS, ARKANSAS BANKERS ASSOCIATION, GEORGIA BANKERS ASSOCIATION, MASSACHUSETTS BANKERS ASSOCIATION, MICHIGAN BANKERS ASSOCIATION, NEW MEXICO BANKERS ASSOCIATION, OHIO BANKERS ASSOCIATION, PENNSYLVANIA BANKERS ASSOCIATION, TENNESSEE BANKERS ASSOCIATION, VERMONT BANKERS ASSOCIATION, WESTERN INDEPENDENT BANKERS, CHASE MANHATTAN CORPORATION, CHEMICAL BANKING CORPORATION, FIRST INTERSTATE BANCORP, KEYCORP, SHAWMUT NATIONAL CORPORATION, AND WELLS FARGO & COMPANY

DAVID W. RODERER *
ERIC L. HIRSCHHORN
DONN C. MEINDERTSMA
WILLIAM B.F. STEINMAN
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5700
Counsel for Amici Curiae

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* Counsel of Record

(Additional Counsel Listed on Inside Cover)

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Of Counsel:

MARCIA Z. SULLIVAN
CONSUMER BANKERS ASSOCIATION
1000 Wilson Boulevard
Suite 3012
Arlington, Virginia 22209

PHILIP GASTEYER
AMERICA'S COMMUNITY BANKERS
900 19th Street, N.W., Suite 400
Washington, D.C. 20006

ARKANSAS BANKERS ASSOCIATION
The Carvill Building
1220 W. Third Street
Little Rock, Arkansas 72201

GEORGIA BANKERS ASSOCIATION
50 Hurt Plaza, Suite 1050
Atlanta, Georgia 30303

MASSACHUSETTS BANKERS ASSOCIATION
73 Tremont Street, Suite 306
Boston, Massachusetts 02108

DONALD HEIKKINEN
MICHIGAN BANKERS ASSOCIATION
222 North Washington Square
Suite 3209
Lansing, Michigan 48933

JOHN W. ANDERSON
NEW MEXICO BANKERS ASSOCIATION
P.O. Box 90880
Albuquerque, New Mexico 87109

JEFFREY D. QUAYLE
OHIO BANKERS ASSOCIATION
27 West Broad, Suite 1001
Columbus, Ohio 43215

LOUISE A. RYND
PENNSYLVANIA BANKERS ASSOCIATION
P.O. Box 152
Harrisburg, Pennsylvania 17108

TIMOTHY L. AMOS
TENNESSEE BANKERS ASSOCIATION
210 Venture Circle
Nashville, Tennessee 37228

VERMONT BANKERS ASSOCIATION
29 Main Street
Montpelier, Vermont 05601

WESTERN INDEPENDENT BANKERS
100 Spear Street
Suite 1505
San Francisco, California 94105

JULIUS L. LOESER
FIRST INTERSTATE BANCORP
633 West 5th Street, Suite 700
Los Angeles, California 90071

DENNIS W. TOIVONEN
CHASE MANHATTAN CORPORATION
2 Chase Plaza, 10th Floor
New York, New York 10081

ARTHUR T. GUJA
CHEMICAL BANKING CORPORATION
270 Park Avenue, 41st Floor
New York, New York 10017

WILLIAM BLAKE
KEYCORP
127 Public Square
Law Group, Second Floor
Cleveland, Ohio 44114

J. MICHAEL SHEPHERD
SHAWMUT NATIONAL CORPORATION
1 Federal Street, OF0905
Boston, MA 02211

JOHN D. WRIGHT
WELLS FARGO & COMPANY
111 Sutter Street, 20th Floor
San Francisco, CA 94136

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Pursuant to Rule 37.3 of the Rules of this Court, *amici curiae* file this brief in support of Petitioner, Barnett Bank of Marion County, N.A., seeking reversal of the

judgment of the Court of Appeals for the Eleventh Circuit. All parties have consented to the filing of this brief and their written consents have been filed with the Clerk.

Florida law purports to prohibit certain national banks from selling insurance. In addition to its anticompetitive effect, the Florida statute at issue contravenes express statutory authorization in the National Bank Act for national banks, including the Petitioner, to sell insurance. Because the Florida law directly conflicts with the National Bank Act, the Florida law would be invalid under traditional preemption analysis. The general language of the McCarran-Ferguson Act, which allows states to regulate the "business of insurance" except where Congress specifically provides otherwise, does not vitiate the preemptive force of the express authorization in the National Bank Act. For these reasons, the judgment of the court of appeals that Florida may prohibit a national bank from selling insurance should be reversed.

INTEREST OF THE *AMICI CURIAE*

Amici have a direct interest in ensuring that national banks are permitted to continue to engage in sales of insurance to the full extent authorized by federal law. *Amici* are national, regional, and state banking associations whose members include banks and savings associations throughout the United States. *Amici* also include financial institutions that engage—directly or through affiliated institutions—in the sale of insurance products.

Three national and regional associations join this brief on behalf of their members. Consumer Bankers Association, America's Community Bankers, and Western Independent Bankers represent nearly 3000 banks and savings associations of all sizes that engage in diverse insurance activities as authorized by Congress. These associations and their members have a direct interest in preserving such activities from restrictive and anticompetitive state laws. Laws of the states in which other members of these

associations operate preclude those members from conducting congressionally authorized insurance activities by prohibiting licensure of such activities. Descriptions of these associations follow:

The *Consumer Bankers Association* (CBA) was founded in 1919 to provide a progressive voice for the retail banking community. CBA represents over 750 federally insured banks and thrift institutions that hold more than eighty percent of all consumer deposits and more than seventy percent of all consumer credit held by federally insured depository institutions in the United States.

America's Community Bankers (ACB) is the national trade association for over 1800 savings and community financial institutions, serving communities in every state. Members are federally and state chartered, stock and mutual in ownership, and FDIC-insured. The industry members that ACB represents have more than $1 trillion in assets, 270,000 employees, and 16,000 offices. Many of ACB's member banks have long provided the public with insurance products and services through related entities under a variety of corporate structures.

Western Independent Bankers (WIB) is the only regional multistate banking association in the United States. Its members consist of 250 independent community banks located in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming, as well as American Samoa and Guam. WIB's members account for more than $34 billion in banking assets.

Nine statewide banking associations also join in this brief. Each state represented by these associations has enacted legislation purporting to prohibit or severely circumscribe the ability of banks, including national banks, to market insurance products. Each state association is described below:

Arkansas Bankers Association has represented Arkansas banks and bank holding companies for 104 years. The

primary objective of the Association is to provide a forum for the financial community to address issues of state and national importance to the business of banking so as to promote a positive banking environment for member banks and customers.

Georgia Bankers Association (GBA) is the statewide association representing commercial banks in the State of Georgia. GBA's members collectively account for virtually all of the banking assets in the state.

Massachusetts Bankers Association is a statewide association representing 192 banks and savings associations in the Commonwealth of Massachusetts. Its members account for $150 billion in banking assets.

Michigan Bankers Association has represented Michigan commercial banks and bank holding companies for over 100 years. It represents approximately 200 commercial banks in Michigan, which collectively account for virtually all of the banking assets in the state.

New Mexico Bankers Association is the principal state trade association for the banking community in New Mexico. Its membership consists of sixty-nine banks and savings institutions, which collectively account for over ninety percent of banking assets in New Mexico.

Ohio Bankers Association is the principal state trade association representing 235 commercial banks in Ohio. Its members range in size from small community banks to large regional institutions.

Pennsylvania Bankers Association (PBA) is the trade association representing approximately 250 commercial and savings banks in the Commonwealth of Pennsylvania. PBA's members hold ninety-nine percent of the commercial banking assets in Pennsylvania.

Tennessee Bankers Association (TBA) is the principal trade association for commercial banks, savings banks, savings associations, and trust companies in Tennessee.

All 249 state and federally chartered banks and trust companies in Tennessee, plus all twenty-seven state and federally chartered savings institutions in the state, are members of TBA.

Vermont Bankers Association (VBA) represents twenty-eight commercial banks and savings associations in Vermont. VBA provides legislative, regulatory and educational services to its members.

In addition to the above-named banking associations, Chase Manhattan Corporation, Chemical Banking Corporation, First Interstate Bancorp, KeyCorp, Shawmut National Corporation, and Wells Fargo & Company join in this brief as *amici*. These institutions have a direct interest in exercising the full range of powers granted to national banks by Congress.

Chase Manhattan Corporation is headquartered in New York, New York and operates two subsidiary banks with 304 consumer branches in three eastern states. It has total assets of $118.8 billion.

Chemical Banking Corporation is headquartered in New York, New York and operates seven subsidiary banks with 458 branches in seven eastern states. It has total assets of $187.9 billion.

First Interstate Bancorp is headquartered in Los Angeles, California and operates fourteen subsidiary banks with 1167 branches in thirteen western states. It has total assets of $56.9 billion.

KeyCorp operates 15 commercial bank subsidiaries in fourteen states, with more than 1400 branch and affiliate offices in twenty-five states.

Shawmut National Corporation is headquartered in Boston, Massachusetts and operates five subsidiary banks with 364 branches in six states. It has total assets of $34 billion.

Wells Fargo & Company is headquarted in San Francisco, California and operates two banking subsidiaries

with 861 branches in two states. It has total assets of $51 billion.

SUMMARY OF ARGUMENT

In 1864 Congress enacted the National Bank Act,[1] establishing our modern national banking system. Among other things, the National Bank Act created a federal regulatory structure for national banks. The act authorizes and directs the Comptroller of the Currency to charter and supervise the affairs of the national banks. The congressional design for the governance of the national banking system, which has been refined by numerous enactments over the years, delineates with care the limited role that the states may play with regard to such associations. This Court consistently has held that the states may neither frustrate the National Bank Act nor impair the functioning of national banks.

In 1916 the Congress specifically authorized national banks located in small communities to sell insurance. 12 U.S.C. § 92[2] ("Section 92"). Section 92 expressly provides that the Comptroller of the Currency is to prescribe rules and regulations governing sales of insurance by national banks.

The State of Florida has enacted a statute that purports to prohibit certain national banks empowered by Section 92 to sell insurance—including the Petitioner—from doing so. Fla. Stat. Ann. § 626.988(2)(West 1984 & Supp. 1995). Florida's attempt to prohibit national banks from exercising such authority squarely conflicts with Section 92.

Florida seeks to avoid the preemptive effect of Section 92 by invoking Section 2(b) of the McCarran-Ferguson Act ("McCarran-Ferguson"), 15 U.S.C. § 1012(b), which

[1] Act of June 3, 1864, ch. 106, 13 Stat. 99. This statute reenacted and amended the Currency Act of 1863, Act of Feb. 25, 1863, ch. 58, 12 Stat. 665.

[2] All citations herein to the United States Code are to the 1994 edition unless otherwise noted.

Florida asserts deprives Section 92 of preemptive force. The court of appeals erroneously accepted Florida's argument. Pet. App. 1a-16a. The history of the federal banking system, the text of its underlying statutory scheme, and the language, history, and purpose of McCarran-Ferguson demonstrate that Congress did not intend McCarran-Ferguson to diminish federal authority, or enhance state authority, over the activities of national banks.

Nothing about McFarran-Ferguson evinces a congressional purpose to alter the carefully crafted balance of authority between federal and state governments under the national banking scheme. Rather, Congress carefully fashioned the two-pronged test of Section 2(b) of McCarran-Ferguson to ensure that federal statutes expressly affecting insurance, such as Section 92, would remain unimpaired. Section 92 explicitly authorizes national banks to sell insurance. Accordingly, that law "specifically relates to the business of insurance" and is not subject to McCarran-Ferguson. The need to maintain the integrity and competitiveness of the national banking system, as well as to harmonize the congressional policy detailed in Section 92 with the limited congressional purpose reflected in McCarran-Ferguson, require that the decision of the court of appeals be reversed.

ARGUMENT

I. THE McCARRAN-FERGUSON ACT WAS NOT INTENDED TO RESTRICT THE POWERS OF NATIONAL BANKS.

A. The Activities Of National Banks, Including Their Sales Of Insurance, Are Regulated By A Pervasive Federal Statutory Scheme.

National banks are creatures of federal law. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 823 (1824). Congress possesses broad constitutional powers to charter banks, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819), and to maintain a national banking system, *Norman v. B. & O. R.R. Co.*, 294 U.S.

240, 303 (1935). Congress devised the modern national banking system during the Civil War to provide a national currency and a federal banking system separate from the previous state-dominated system. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 99 (collectively referred to herein as the National Bank Act). As an essential element of the National Bank Act, Congress fashioned a federal framework to regulate the chartering and supervision of national banks. Congress placed the Comptroller of the Currency at the helm of that scheme. *See, e.g.,* 12 U.S.C. § 1.

"The National Bank Act constitutes 'by itself a complete system for the establishment and government of National Banks.'" *Deitrick v. Greaney,* 309 U.S. 190, 194 (1940) (quoting *Cook County Nat'l Bank v. United States,* 107 U.S. 445, 448 (1883)). National banks are organized under federal law, 12 U.S.C. §§ 21-23, which empowers them to conduct their corporate affairs, *e.g.,* 12 U.S.C. §§ 24, 29 (power to hold real property); *see generally NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.,* 115 S. Ct. 810 (1995) ("*NationsBank*"). Inter alia, federal law sets the number and qualifications for directors, 12 U.S.C. §§ 71-78, determines the extent to which national banks may engage in branching, 12 U.S.C § 36, and establishes dissolution and receivership requirements, 12 U.S.C. §§ 181-200.

The Comptroller, who is appointed by the President and confirmed by the Senate, 12 U.S.C. § 2, supervises the activities of national banks. *NationsBank,* 115 S. Ct. at 813; *United States v. Weitzel,* 246 U.S. 533, 540 (1918); *United States v. Corbett,* 215 U.S. 233, 240 (1909) (referring to the Comptroller's "comprehensive powers" over "the operations of national banks"). The Comptroller has plenary power, unimpeded by state laws, to charter national banks. After assessing a national bank association's financial condition, including whether the association's capital is sufficient, the Comptroller may

certify the association to commence business. 12 U.S.C. §§ 26-28; *see generally* 12 U.S.C. §§ 51-67 (provisions governing national bank capital, stock, and stockholders).

Each national bank must submit to the Comptroller reports concerning its condition, the dividends declared or paid, and the condition of the bank's affiliates. 12 U.S.C. §§ 161, 164. The Comptroller has general rule-making power to regulate national bank activities, 12 U.S.C. § 93a, may set limitations and conditions on the making of certain loans by national banks, 12 U.S.C. § 371(a), appoints examiners to examine the affairs of national banks, 12 U.S.C. §§ 481-482, may appoint and discharge conservators, 12 U.S.C. §§ 201-209, may approve national bank association consolidations, 12 U.S.C. § 215(a), and may impose regulatory sanctions and civil penalties for violations of banking laws or regulations, 12 U.S.C. § 1818. The Comptroller reports annually to Congress on these activities. 12 U.S.C. § 14.

In addition to their general powers to conduct the business of banking and incidental activities, *see* 12 U.S.C. § 24 (Seventh); *NationsBank,* 115 S. Ct. 810, national banks may engage in various banking and related activities specifically determined by Congress to be appropriate. Congress has constitutional authority to grant national banks any powers, including trust and agency powers, that are "appropriate or relevant to the banking business." *First Nat'l Bank v. Fellows ex rel. Union Trust Co.,* 244 U.S. 416, 420 (1917).

Congress in 1916 expanded national bank powers by enacting Section 92, which authorizes national banks located in small towns to sell insurance and empowers the Comptroller to regulate this activity. Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753. Section 92 provides:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population

of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however,* That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

12 U.S.C. § 92. A central purpose of Section 92 was to "enlarge" national bank powers, providing such institutions "with additional sources of revenue and plac[ing] them in a position where they could compete with local state bank and trust companies." Letter from J. Skelton Williams, Comptroller of the Currency, to Sen. Robert L. Owen (June 8, 1916), *reprinted in* 53 Cong. Rec. 11001 (1916).

B. Florida May Not Interfere With The Authorized Operations Of National Banks Unless Authorized By Congress To Do So.

National banks operate outside the sphere of state regulation of the business of banking. The national banking system is to be " 'independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States.' " *First Nat'l Bank v. California,* 262 U.S. 366, 369 (1923) (quoting *Easton v. Iowa,* 188 U.S. 220, 229 (1903)).

This Court long has recognized that where the federal regulatory mechanism deals with activities of national banks, the states may not circumscribe those activities even in areas that normally might be considered matters of state concern. In *Easton v. Iowa* this Court held that because the National Bank Act established a mechanism to address the insolvency of a national bank, Iowa could not enforce a law penalizing a national bank's officers for accepting deposits during a period of insolvency.

> Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; . . . Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency [and] it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government.

Easton, 188 U.S. at 238.

A further illustration of the limited state power over national bank operations is the fact that state banking officials explicitly are precluded from reviewing national bank records except in narrowly restricted circumstances. *See* 12 U.S.C. § 484(b) (permitting state examinations only to ensure compliance with applicable state unclaimed property or escheat laws, and then only if the state has reasonable cause to believe that those laws have been violated); *see also Guthrie v. Harkness,* 199 U.S. 148, 159 (1905) ("It was the intention that this statute [Rev. Stat. § 5241] should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation."); 12 U.S.C. § 92a(c) (state banking authorities may review Comptroller's reports of ex-

amination of national banks insofar as the reports relate to the trust department of the bank but are not authorized by this provision to examine the books, records, or assets of the bank itself).

In general, state attempts to regulate national banks must fail when the state law conflicts with federal law, frustrates the congressional purpose underlying the federal banking statutes, or impairs the efficiency of national banks.

> National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.

Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896). "General and undiscriminating" state laws are applicable to national banks, as to other busineses, so long as those laws do not impair the exercise by national banks of the powers Congress has entrusted to them. *Id.* at 290; *First Nat'l Bank v. Missouri,* 263 U.S. 640, 656 (1924); *McClellan v. Chipman,* 164 U.S. 347, 357 (1896).

But where Congress has granted national banks the right to exercise a particular power, or where national banks may engage in certain activities by virtue of the business they are empowered to conduct, a state cannot limit the ability of national banks to exercise that power unless Congress expressly has authorized the state to do so. On a few narrow and explicit occasions, Congress has done just that.

Branch banking is a notable example, particularly because at the same time the Senate considered Section 92—which does not provide for state-imposed limitations—it considered whether to permit state law to limit branching by national banks. The Senate version of the bill that enacted Section 92 also contained a provision designed to permit national banks to establish branches. *See* S. Rep. No. 481, 64th Cong., 1st Sess. 8 (1916). During floor debate the Senate agreed to an amendment that would prohibit such branching "in any State whose statutes do not specifically authorize branches for banks having State charters." 53 Cong. Rec. 11153 (1916). Moments later the Senate took up the provision that ultimately became Section 92. *Id.* The *lone* issue discussed about the insurance sale provision was whether the threshold population figure should be 3000, as the Comptroller and the Senate Banking and Currency Committee had recommended, or 5000, as requested by Senator Nelson of Minnesota. *Id.* The latter figure was agreed to. *Id.* Thus the Senate, fresh from debate on imposing state law limitations on branch banking, considered Section 92 with not a single senator suggesting that this new power to act as insurance agent should be subject to state law restrictions. Although the branch banking provision was dropped in conference, S. Rep. No. 533, 64th Cong., 1st Sess. 7 (1916) (conference report), the state law limitation on branching was included when the McFadden Act authorized national banks to establish branches eleven years later. Act of Feb. 25, 1927, ch. 191, § 7, 44 Stat. 1225, 1228 (current version at 12 U.S.C. § 36).

Congress in other instances has authorized state law limitation on national bank powers. For example, Congress has provided that state laws limiting interest rates apply to national banks located in those states. 12 U.S.C. § 85; *see generally Farmers' & Mechanics' Nat'l Bank v. Dearing,* 91 U.S. 29 (1875) (discussing forerunners of 12 U.S.C. § 85). Congress intended some of these pro-

visions to ensure that national banks enjoy the same benefits that have been conferred by state legislatures on state banks. *E.g.*, 12 U.S.C. § 29 (providing that in certain circumstances, national banks may hold property for as long as a state-chartered bank would be permitted to do so under state law). Congress likewise has authorized national banks to act "as trustee, executor, administrator, [or] registrar of stocks and bonds," so long as such authorization is "not in contravention of State or local law." 12 U.S.C. § 92a; *see also, e.g.*, 12 U.S.C. § 24 (Eighth) (permitting charitable contributions by national banks unless state law prohibits such contributions by state banking institutions); 12 U.S.C. § 90 (permitting national banks to give security for deposits by states or political subdivisions to the extent authorized by state law).

In short, where Congress intends to permit state law to circumscribe federally created banking powers, Congress does so expressly and should not lightly be presumed to do so by implication. *See Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378 & n.7 (1954). In *Franklin*, this Court held that New York could not prohibit a national bank from using the term "savings" in its name because national banks had the right to receive deposits and pay interest on customers' savings. Although the state law presented no direct conflict (because the National Bank Act does not expressly empower national banks to use "savings" in their names), the Court found no congressional intent to subject a "phase of national banking to local restrictions" by implication where Congress had done so "by express limitation in several other instances." *Id.* at 378; *see also Ramapo Bank v. Camp*, 425 F.2d 333, 344 (3d Cir.) (because National Bank Act provision on bank relocations contains no express grant of power to states, contrary state law preempted), *cert. denied*, 400 U.S. 828 (1970). Except as Congress has otherwise provided, "the State cannot lay hold of its general control of administration to deprive national

banks of their power to compete that Congress is authorized to sustain." *Missouri ex rel. Burnes Nat'l Bank v. Duncan*, 265 U.S. 17, 24 (1924) (Holmes, J.).

Congress did not subject the "phase of national banking" at issue here—insurance agency activity—to "local restrictions." Section 92 accords the states *no* power over national banks. Congress explicitly acknowledged in Section 92 that the states regulate insurance companies doing business within their borders, but designated the Comptroller to regulate the activities of national banks acting as agents for state-licensed insurance companies.[8] Congress kept in the hands of the Comptroller, and out of the hands of the states, authority over the insurance-related activities of the national banks themselves.

In granting national banks the power to act as insurance agents, Congress could have permitted banks to exercise that power only where in accord with state law. Congress also could have provided that national banks may act as insurance agents subject to "such rules and regulations as the State insurance authorities may prescribe." Or Congress might have provided that national banks may act as general insurance agents to the "same extent as state-chartered banks" or only if such activity were "not in contravention of State law."

Congress did not select any of these options. Section 92 does not contemplate *any* state role in determining whether national banks may sell insurance. Congress chose to retain federal supremacy over the power of

[8] "[A national banking] association located and doing business in any place the population of which does not exceed five thousand . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authoriites of the State in which said bank is located to do business in said State." 12 U.S.C. § 92.

national banks to act as insurance agents and reposed in the Comptroller authority to prescribe any necessary rules.

The Florida antiaffiliation law provides that "[n]o insurance agent . . . who is associated with . . . a financial institution shall engage in insurance agency activities." Fla. Stat. Ann. § 626.988(2) (quoted in full at page 5 of Petition). The Florida law by its terms imposes this restriction upon national banks as well as state chartered institutions. *Id.* § 626.988(1)(a) (see Pet. at 4-5). Florida singles out banks, including national banks and affiliated persons, banning them from the insurance marketplace despite the express language of Section 92.[4] Florida's law thus seeks to do precisely what Justice Holmes described as forbidden—"to deprive national banks of their power to compete." *See Missouri ex rel. Burnes Nat'l Bank,* 265 U.S. at 24.

C. The General Language Of The McCarran-Ferguson Act Is Not Directed At National Bank Powers, Including The Specific Power To Sell Insurance Granted By Section 92.

Mc-Carran-Ferguson was not intended to restrict national bank insurance activities authorized by federal law. Neither its text nor its legislative history contains any reference to banking.

Until 1944 many believed that the issuance of insurance contracts was not a transaction in "commerce." In that year this Court held that Congress has power under

[4] That the Florida statute is riddled with exceptions—i.e., it exempts from the restriction banks that are not subsidiaries or affiliates of a bank holding company and are located in a city having less than 5000 residents, as well as "grandfathered" banks engaged in insurance sales prior to enactment, Fla. Stat. Ann. § 626.988(1) —demonstrates that the law's true purpose is to protect the income of independent insurance agents. *See generally* Brief of American Bankers Association et al. as Amici Curiae, Point II; Brief of Florida Bankers Association as Amicus Curiae, *passim.*

the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3, to regulate insurance activity and had exercised that power permissibly in enacting the Sherman Act. *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944).

In the eyes of Congress, *South-Eastern Underwriters* threatened long-standing state regulation and taxation of the business of insurance in two ways. First, federal laws enacted under Commerce Clause authority could, by implication, be applied to supersede state regulation of insurance. Second, even in the absence of legislation under the Commerce Clause, the "dormant" commerce power might be construed to restrict state regulation of insurance activity. *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 429 (1946).[5]

McCarran-Ferguson states that it was enacted so that "*silence* on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation" of the insurance business by the state. 15 U.S.C. § 1011 (emphasis added). In the words of Senator O'Mahoney, which were confirmed by Senator Ferguson, what Congress sought to assure was that "no existing law and no future law should, *by mere implication,* be applied to the business of insurance" simply because the law might relate to commerce. 91 Cong. Rec. 1487 (1945) (emphasis added). To this end, Section 2(b) of McCarran-Ferguson provides that a federal law may only preempt state insurance laws if the federal enactment "specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

[5] Before *South-Eastern Underwriters,* "negative implication from the commerce clause was held not to place any limitation" on state insurance regulation, *Benjamin,* 328 U.S. at 414, and the Supreme Court routinely had upheld state regulation of the insurance activities of out-of-state companies, *e.g., Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1869).

Accepted principles of statutory construction, as applied by this Court to the federal banking laws, confirm this conclusion:

> [A] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."

Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)) (footnote omitted); *see also Cook County Nat'l Bank*, 107 U.S. at 448, 451 (describing National Bank Act as "a complete system for the establishment and government of national banks" and stating that as a specific, comprehensive statute on a particular subject, the National Bank Act prevails over a general—though in that instance an earlier-enacted—statute).

In *Radzanower* an action was brought against a national bank for alleged violations of the Securities Exchange Act of 1934. The bank was headquartered in Boston but the action was brought in the Southern District of New York. The district court dismissed the action because the special venue provision of the National Bank Act then in force, 12 U.S.C. § 94 (1970), required that a lawsuit against a national bank be brought in the district where the home office of the bank was located. The court of appeals affirmed. In this Court the plaintiff-petitioner claimed that the applicable venue provision was not that of the National Bank Act but that of the Securities Exchange Act of 1934. The latter provision permitted a securities fraud action to be brought in any district where the violation occurred or where the defendant might be found.

Writing for the Court, Justice Stewart first noted that 12 U.S.C. § 94 evidenced a specific intent by Congress to

limit the courts in which a national bank could be sued. *Radzanower*, 426 U.S. at 152. Invoking the rule of statutory construction that the specific overrules the general, even where the general law is the later-enacted of the two, *id.* at 153, as well as the " 'cardinal principle . . . that repeals by implication are not favored,' " *id.* at 154 (quoting *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976) (footnote omitted)), the Court held that the national bank venue provision prevailed. The Court also noted that "[t]he legislative history of the Securities Acts does not indicate that Congress considered banks as likely defendants in actions brought under those acts." *Id.* at 155 n.11.

Radzanower is analogous to this case. The Court there noted that "[w]hen Congress enacted the narrow venue provisions of the National Bank Act, it was focusing on the particularized problems of national banks." *Id.* at 153. Seventy years later in the Securities Exchange Act, Congress "enacted a general venue provision applicable to the broad universe of potential defendants." *Id.* at 153-54. So too here: When Congress enacted Section 92 in 1916, it focused on the particularized issue of national bank sales of insurance and the public policies favoring such activity. Decades later Congress included in McCarran-Ferguson a general provision directed to state regulation of the business of insurance, saying nothing in the statute or legislative history about national banks.

Radzanower found no "clear intention" on the part of Congress in enacting the general securities fraud venue provision to effect a "*pro tanto* repeal" of the specific banking venue provision. *Id.* at 154 (noting that repeals by implication are not favored). The Court's observation that the Securities Act "was enacted primarily to halt securities fraud, not to regulate banks," *id.* at 157, applies with equal vigor here: McCarran-Ferguson was intended to preserve existing state regulation of the business of

insurance as against *implied* congressional intrusion, not to regulate banks or, for that matter, even to override *express* federal statutes relating to the business of insurance. *See First Nat'l Bank of Eastern Ark. v. Taylor*, 907 F.2d 775 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990) (holding that McCarran-Ferguson was "not directed at the activities of national banks"); *see also United Serv. Automobile Ass'n v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986) (state antiaffiliation law not within scope of McCarran-Ferguson because, inter alia, "banks are not entities within the insurance industry"), *cert. denied*, 479 U.S. 1031 (1987). As with the securities acts, the text and legislative history of McCarran-Ferguson contain no reference to banks. *See Radzanower*, 426 U.S. at 155 n.11.

Section 92 expressly authorizes the Comptroller to oversee sales of insurance by national banks and to prescribe "rules and regulations" to govern national banks acting as insurance agents.[6] Unlike the McFadden Act and the other provisions noted above, Section 92 does not contemplate any state-law limitations on such activities.

Florida's law directly conflicts with the statutory power specifically bestowed by Section 92: Florida has attempted absolutely to prohibit Petitioner, which is a national bank, from exercising its Section 92 right to sell insurance. Under traditional preemption analysis, Florida's law would fall because it interferes with the congressional scheme. *E.g., Franklin Nat'l Bank*, 347 U.S. at 378-79 (power implicit under the federal banking laws for banks to use word "savings" in advertising preempts New York law prohibiting use of that term); *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982) (California law prohibiting due-on-sale clause in loan instruments preempted by federal law permitting same); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (state law preempted where federal law "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"). Nothing in the text, legislative history, or purpose of McCarran-Ferguson alters this conclusion.[7]

[6] The enactment of Section 92 in 1916 marked one of the first congressional grants of rulemaking authority to the Comptroller. More than sixty years would pass before Congress explicitly granted the Comptroller broad rulemaking powers. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 708, 94 Stat. 132, 188 (codified as amended at 12 U.S.C. § 93a).

II. EVEN IF McCARRAN-FERGUSON APPLIES TO NATIONAL BANKS, SECTION 92 "SPECIFICALLY RELATES" TO THE BUSINESS OF INSURANCE WITHIN THE MEANING OF SECTION 2(b) OF McCARRAN-FERGUSON AND ACCORDINGLY IS PRESERVED BY McCARRAN-FERGUSON.

Even if McCarran-Ferguson applies to national banks, Section 2(b) does not save the Florida statute from preemption by Section 92. Section 2(b) provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insur-

[7] Because the Florida law flatly prohibits bank participation in insurance sales, this case presents only the issue whether a state may *deny* a national bank or its employees a license to engage in insurance activities. The Court need not address the extent, if any, to which states may require national banks to conform to insurance regulations that otherwise apply to licensed insurance agents. Should such issues arise, the Comptroller has the express authority under Section 92 to deal with them. Indeed, the Comptroller long has encouraged national banks to comply with state insurance licensing laws that neither discriminate against nor stand as an obstacle to national banks. He has issued opinion letters asserting that national banking laws preempt state licensing requirements in only those narrow circumstances. *See* OCC Letter No. 475 (March 22, 1989), *reprinted in* [1989-1990 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,012; OCC Letter No. 623 (May 10, 1993), *reprinted in* [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,505.

ance . . . unless such Act *specifically relates to the business of insurance.*

15 U.S.C. § 1012(b) (emphasis added). The language, history, and purpose of Section 2(b) compel the conclusion that Section 92 "specifically relates" to the business of insurance.[8]

When read in conjunction with Section 2(b), Section 92 is seen to preempt the conflicting Florida law because Section 92 explicitly authorizes insurance sales by national banks and therefore "specifically relates to the business of insurance." In ordinary parlance, "specifically relates" means no more than that the law refers in some explicit sense to or has a connection with that subject. "The ordinary meaning of ['relating to'] is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with.'" *Morales v. Trans World Airlines,* 504 U.S. 374, 383 (1992) (quoting Black's Law Dictionary); *see also New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 115 S. Ct. 1671, 1677 (1995) ("in the normal sense of the phrase," the term "relates to" means "has a connection with or reference to") (quoting *Shaw v. Delta Air Lines,* 463 U.S. 85, 96-97 (1983) (internal quotation marks omitted)). Thus the plain meaning of Section 2(b) is that federal law preempts state insurance regula-

[8] Because Section 92 specifically relates to the business of insurance and therefore preempts the Florida antiaffiliation statute, this Court need not determine whether the Florida statute was "enacted for the purpose of regulating the business of insurance" under the first prong of Section 2(b). Should the Court reach that issue, however, the first prong does not shield the Florida statute from preemption. The Florida statute was enacted to regulate the conduct of banks, not to regulate the business of insurance. *See United Service Automobile Ass'n v. Muir,* 792 F.2d at 364 (holding that "affiliation between insurers and banks has no integral connection to the relationship between insured and the insurer"); *see also* Brief of American Bankers Association et al. as Amici Curiae, Point II; Brief of Florida Bankers Association as Amicus Curiae, *passim.*

tion if the federal provision bears an express relation to the business of insurance.

Senator Ferguson, the Senate sponsor of McCarran-Ferguson, confirmed this conclusion during floor debate on the legislation. The purpose of the "specifically relates to" provision, he explained, was to assure that federal legislation be accorded preemptive force only if it does more than relate generally to interstate commerce:

> What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance. We wanted to be sure that the Congress, in its wisdom, would act specifically *with reference to insurance* in enacting the law.

91 Cong. Rec. 1487 (1945) (emphasis added).

Section 92 speaks directly and unambiguously to the business of insurance, and its relation to that business is not "by mere implication." *Id.* (colloquy between Sens. O'Mahoney and Ferguson). Among other things, it states that certain national banks may "act as the agent for any fire, life or other *insurance* company . . . by soliciting and selling *insurance*" and precludes national banks from guaranteeing the "payment of any premium on *insurance* policies." 12 U.S.C. § 92 (emphasis added). Indeed, the stated purpose of Section 92 is to permit national banks to engage in the sale of insurance. The congressional concern underlying McCarran-Ferguson—that federal law not be construed by mere implication to override state insurance law—has no application to this case.

Further demonstrating that "specifically relates to" carries no more than its obvious meaning (i.e., refers to in a specific manner), Congress provided elsewhere in Section 2(b) that *state* laws are shielded from preemption only where such laws have the purpose to *"regulat[e]"* —and *not* simply *relate to*—the business of insurance. 15 U.S.C. § 1012(b) (emphasis added); *see Morales,* 504

U.S. at 383-84 (distinguishing between "relating to" and "regulate"). "Regulate" means "[t]o fix, establish, or control; . . . to direct by rule or restriction; to subject to governing principles or laws." Black's Law Dictionary 1286 (6th ed. 1990). Congress did not limit the category of preemptive *federal* statutes to those that *regulate* the business of insurance, however. The contrasting terminology used deliberately by Congress to distinguish between the two prongs of Section 2(b), cannot be dismissed as easily as the Respondents suggest.

The court of appeals contended that Section 92 does not specifically relate to the business of insurance because Congress enacted the provision before this Court's decision in *South-Eastern Underwriters,* at a time when Congress did not believe that it had power to "regulate" the business of insurance. Pet. App. 15a. Given Congress' choice not to use the term "regulate" to describe the federal laws that preempt state insurance regulation, however, this conclusion is erroneous. *See Morales,* 504 U.S. at 385-86 (holding that when Congress uses the word "relate" it conveys a different—and far broader—meaning than "regulate").

Moreover, given that when McCarran-Ferguson was enacted there were no existing federal laws that evidenced an intent to "regulate" the business of insurance, the court of appeals' novel interpretation of the phrase "relates to" as meaning "regulates" makes no sense. *E.g., South-Eastern Underwriters,* 322 U.S. at 544 (noting that before 1944 "Congress had at no time attempted to control the insurance business"). Although Congress had not "regulated" insurance prior to 1945, McCarran-Ferguson was intended to retain the preemptive effect not only of future acts of Congress but of federal statutes *then in force.* 91 Cong. Rec. 479 (1945) (colloquy between Sens. Murdock and Ferguson). "Specifically relates" thus means nothing more than that a law expressly relates to insurance. Section 92 passes this test.

Finally, the court of appeals failed to consider that Congress rejected language for McCarran-Ferguson under which federal statutes would have preempted state insurance regulation in a far narrower class of cases than that covered by the enacted version of the legislation. The House and Senate-passed versions provided that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act *specifically so provides."* 91 Cong. Rec. 488 (1945) (Senate) (emphasis added); *id.* 1085-94 (House). Had Congress enacted that language, a federal act would have to provide expressly that it invalidates, impairs, or supersedes state law in order to have preemptive effect upon a state insurance regulation. The conference version of the legislation, however, provided that a federal law need only "specifically *relate to* the business of insurance" in order to "invalidate, impair or supersede" state law. H.R. Rep. No. 213, 79th Cong., 1st Sess. 1 (1945) (conference report) (emphasis added). Congress agreed to, and President Roosevelt approved, the conference version. Act of March 9, 1945, ch. 20, 59 Stat. 34. Thus Congress expressly considered and rejected the very formulation that the court of appeals has imposed in the decision under review.

So long as a federal statute has an express connection to insurance activities, then, *see Morales,* 504 U.S. at 383-84, it will preempt conflicting state laws that regulate insurance. Section 92 fits comfortably within the type of federal law that specifically relates to the business of insurance and accordingly is preserved by the second prong of McCarran-Ferguson's Section 2(b).

CONCLUSION

For the reasons set out above and in the other briefs filed in support of the Petitioner, the judgment of the court of appeals should be reversed and remanded with instructions to enter a judgment declaring that Section 92 preempts Fla. Stat. Ann. § 626.988(2) and permanently enjoining the Florida authorities from interfering with the Petitioner's exercise of its national bank rights under Section 92.

Respectfully submitted,

DAVID W. RODERER *
ERIC L. HIRSCHHORN
DONN C. MEINDERTSMA
WILLIAM B.F. STEINMAN
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5700
Counsel for Amici Curiae

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* Counsel of Record